Supreme Court, U.S.
FILED

02 1026 JAN 6 2003

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

MICHAEL L. MILLER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether there is a compelling reason to grant the Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law that has not been but should be settled by this Court.

1. Specifically, the Fifth Circuit determined that Petitioner Miller did not check the correct box on the EEOC complaint form or otherwise disclose his retaliation claim and thereby exhaust his administrative remedies. The Fifth Circuit referred to a Seventh Circuit case[1] in making its argument. However, the Fifth Circuit misinterpreted the Seventh Circuit precedent[2]. Because the Fifth Circuit misapplied and misinterpreted Seventh Circuit precedent and this Court has not ruled on this issue, there is compelling reason to grant this Petition for Writ of Certiorari.

2. Whether doctor prescribed limitations on ability to work overtime is a substantial limitation when overtime is mandatory. The Fifth Circuit determined that Petitioner's ability to work overtime was not a substantial

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[1] *Cable v. Ivy Tech State College*, 200 F.3d 467,477 (7th Cir. 1999).

[2] The Fifth Circuit stated that the *Cable Court*, "found that there was no indication form the EEOC charge boxes, narrative or supplemental material that the Plaintiff sought redress for the retaliation claim..." Order affirming summary judgment, page 8. When in actuality, the *Cable* Court found that the dismissal of Cable's retaliation charge for failure to exhaust administrative remedies was error as Cable had put the Respondent on notice of his retaliation charge and exhausted his administrative remedies. *Id. at 473.*

limitation on Petitioner Miller's ability to work under the Americans with Disabilities Act. Again, this Court has not ruled on this issue and the cases cited by the Fifth Circuit did not take into account scenarios like Petitioner's where overtime was substantial and mandatory, there is compelling reason to grant this Petition for Writ of Certiorari. [3]

[3] *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593 (6th Cir. 2002) and *Brennan v. Nat'l Tel. Directory Corp.*, 850 F.Supp. 331 (E.E. Pa. 1994). In the instant case, Defendant was requiring Plaintiff and others to work seven days at a total of 84 hours per week. Plaintiff was restricted to 50 hours per week. Appellant's brief to the 5th Circuit, page 6.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner is not required to file a corporate disclosure statement. Petitioner/Plaintiff is an individual. Respondent/Defendant Southwestern Bell Telephone Company is a Missouri Corporation. SBC Communications Inc. is a Delaware Corporation and the parent company of Southwestern Bell Telephone Company.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to hear this case under the Americans with Disabilities Act, 42 U.S.C. § 12101 (1994). Jurisdiction is also proper and timely pursuant to 28 U.S.C. § 2101 (c), Supreme Court Rules 12.1, 13.1, 13.3, and 29.

OPINIONS BELOW

Appellant is appealing an Order affirming Summary Judgment entered October 7, 2002 by the United States Court of Appeals for the Fifth Circuit.

The United States District Court for the Southern District of Texas entered a final order on November 20, 2001 and a Summary Judgment order on October 24, 2001.

I

STATEMENT OF THE CASE

A. *Statutes Involved as the Basis for Federal Jurisdiction in the Court of the First Instance*

42 U.S.C. § 12101 *et seq.*

§ 12112 Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the

hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

B. *Facts Material to the Consideration of the Questions Presented*

Summary Judgment was granted for the Defendant and Miller appealed to the Fifth Circuit. The case was ultimately dismissed by an order entered on October 7, 2002.

Petitioner Michael L. Miller was a 24-year veteran of Defendant Southwestern Bell's workforce who began employment in 1974 as a splicer's helper and ultimately became a customer service technician. In 1996 and again in 1998, Mike Miller underwent heart surgery. Miller went out on disability leave from July 17, 1998 through September 7, 1998 for surgery related to his heart: Alcohol Septal Reduction Procedure. Miller's doctor diagnosed him with Hypertropic Obstructive Cardiomyopathy.

Immediately upon return to work in September of 1998, Miller informed his supervisor Dale Dugas, that his doctor restricted him to work only 40 hours a week. Miller's doctor then restricted Plaintiff to work only 10 hours of overtime. During that time frame, and contemporaneously with Miller's overtime restrictions, Defendant declared a service emergency and required all individuals in Miller's job position to work 12 hour shifts seven days a week, a total of 84 hours per week mandatory. Though to many, a restriction of 50 hours per week does not sound like a serious job restriction, it impacted Miller severely, as his doctor mandated restriction required him to work 34 hours less per week than his fellow employees.

Mr. Miller began to experience chest pains in the middle of September 1998. In fact, Defendant's agent and Miller's supervisor, Dale Dugas stated that in the short, less than three week period, that Miller was back on the job, she noticed that on the days Miller worked 10 hours a day, he appeared more tired. On September 21, 1998, Miller's heart condition worsened, he experienced chest pains and he had to stop working and rest.

On the day Miller had to stop working and rest, he was assigned two jobs at 17534 Golden Glade. Another customer service technician, Tony Figliola, was assigned to the same job site on that same day.

On September 21, 1998, Miller left a job site (Cedarwood), drove to the Golden Glade site, put out the cones to secure the road, inspected the job and realized that it had been repaired. When Miller left the site, he drove to the Central Office, received phone calls from customers and returned a page from his daughter. While Miller was at the Central Office he experienced those chest pains hit so he also stopped working, rested and took some medication. Miller went from the Central Office to the garage where he cleaned out his truck, gassed it up and went into the office.

Miller attributed driving to Golden Glade, setting out the cones, inspecting the site, driving to the Central Office, returning the phone calls and resting and taking medication at the Central Office, driving from the Central Office to the garage, and cleaning and gassing up his truck as time for the Golden Glade job pursuant to Southwestern Bell policy.

Mike Miller worked 13 hours on September 21, 1998.

Defendant's policy as it related to "charging time" is to charge time to the new job as soon as they completed the old job. Policy dictates discretion for travel, cleaning the trucks and gassing up the vehicle. In fact, if a technician gassed up in the afternoon, they would probably charge the time to the last job in the afternoon and if they did it in the morning they would charge that activity to the first job of the new day. Miller did not commit fraud or forge any documents.

Three days later on September 23, 1998, Defendant's agent, Dale Dugas spoke with Miller and asked him about the Golden Glade job. Miller did not remember some of the information and Dugas said she would meet with him the next day. Dugas and another manager went to the Golden Glade address to see what work was done. However, they did not, at any time, retrace Miller's steps to validate or justify the length of time Miller had attributed to the Golden Glade job pursuant to policy.

Less than three weeks after returning from a disability leave and after requesting accommodations regarding overtime and to rest due to chest pains, Defendant suspended then terminated a 24-year long employee. Miller was not on any progressive discipline at the time of his suspension.

II

SUMMARY OF THE ARGUMENT

Both the District Court and the United States Court of Appeals for the Fifth Circuit decided, erroneously, an important question of Federal law that has not been, but

should be, settled by this Court. There are compelling reasons why this Court should grant this Petition for Writ of Certiorari and consider these important questions.

First, Specifically, the Fifth Circuit determined that Petitioner Miller did not check the correct box on the EEOC complaint form or otherwise disclose his retaliation claim and thereby exhaust his administrative remedies. The Fifth Circuit referred to a Seventh Circuit case[4] in making its argument. However, and with due respect, the Fifth Circuit misinterpreted the Seventh Circuit precedent[5]. Because the Fifth Circuit misapplied and misinterpreted Seventh Circuit precedent and this Honorable Court has not ruled on this issue, there is compelling reason to grant this Petition for Writ of Certiorari.

Additionally, the Fifth Circuit determined that restrictions on working overtime were not substantially limiting on the major life activity of working. However, the cases cited by the Fifth Circuit do not deal with cases such as the instant case where large amounts of overtime (34 hours) are required. The cases cited do not consider any required

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[4] *Cable v. Ivy Tech State College,* 200 F.3d 467,477 (7th Cir. 1999).

[5] The Fifth Circuit stated that the *Cable Court*, "found that there was no indication form the EEOC charge boxes, narrative or supplemental material that the Plaintiff sought redress for the retaliation claim..." Order affirming summary judgment, page 8. When in actuality, the *Cable* Court found that the dismissal of Cable's retaliation charge for failure to exhaust administrative remedies was error as Cable had put the Respondent on notice of his retaliation charge and exhausted his administrative remedies. *Id. at 473.*

overtime. Finally, the two cases cited[6] are in the Sixth Circuit and Eastern District of Pennsylvania, respectively, and the Supreme Court of the United States has not ruled on whether limitations on mandatory overtime is substantially limiting on the major life activity of working.

The District Court and the Fifth Circuit's reasoning was incorrect that the District Court misapplied (and misinterpreted from other circuits) law to fact and settled an important question of law that should be settled by this Honorable Court. Moreover, Miller further asserts that in evaluating the summary judgment standard, the District Court inappropriately weighed the evidence in favor of Southwestern Bell Telephone Company. In effect, the District Court assumed there was fact issues present and went on to assume the role of fact finder. The District Court granted summary judgment on its own factual determinations, which are best left to the proper fact finder, the jury. Therefore, despite the existence of Miller's *prima facie* case, the District Court denied Miller his right to a jury trial. The United States Court of Appeals for the Fifth Circuit went on to affirm that ruling.

[6] *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593 (6th Cir. 2002) and *Brennan v. National Telephone Directory Corporation*, 850F.Supp. 331 (1994).

III

REASONS FOR GRANTING WRIT

A. *Michael Miller Has Brought an Important Question of Federal Law That Has not Been, but Should be Settled by this Court.*

Actually, Michael Miller has brought two important questions of Federal Law that have not been but should be settled by this Court. Generally, a Plaintiff may not bring claims that were not in the EEOC charge. *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974). This requirement allows the EEOC to investigate the claim while also providing the employer with full notice of the charges against it. *Id.* In its Order dated October 7, 2002, the Fifth Circuit stated that Miller is precluded from making a retaliation claim regarding his disability claim because he did not check a box or otherwise disclose that claim. There are two things inherently wrong with that reasoning.

First, the case utilized by the Fifth Circuit to support its reasoning is from the Seventh Circuit and does not purport to rule the way the Fifth Circuit says it does. The Fifth Circuit stated that the *Cable* court deemed the plaintiff's narrative to have given insufficient indication to the EEOC or the employer that he was seeking redress for unlawful retaliation. Order affirming summary judgment, page 18. Actually, *Cable* supports a reversal of summary judgment. The *Cable* Court found that the dismissal of Cable's retaliation charge for failure to exhaust the administrative remedy ***was*** **[emphasis ours]** error. *Cable,* 200 F.3d 467. The EEOC charge filing requirement is not intended to "let the form of the purported charge prevail over its substance". *Downes v. Volkswagen of America, Inc.,* 41 F.3d 1132 (7th

Cir. 1994). Courts have allowed various types of filings to satisfy the EEOC filing requirement. *Taylor v. Virginia Union Univ.*, 193 F.3d 219 (4th Cir. 1999).

In the instant case, Miller went to the EEOC and completed a charge of discrimination along with a charge information form, which was filed with the EEOC. In that charge information form, Miller stated that he was discriminated for age and disability, "heart condition, Grade II spondylithesis and degenerative arthritis in knee and shoulder." He went on to say, "[t]he alleged misconduct was a subterfuge to fire an employee nearing retirement. I had taken a break from work due to chest pains and had included this time on my time report. They alleged fraud". In other words, Miller who had requested accommodations by way of reduced mandatory overtime stemming from his heart condition, took a break for chest pains and was retaliated against by being fired. Miller gave notice to the EEOC and the employer that he was retaliated against for engaging in protected activity relating to his disability.

On page 10 of its Order affirming Summary Judgment, the Fifth Circuit cited to Miller's narrative, however, ignoring and omitting the language, "[t]his charge is amended to cure a technical defect in the omission of an additional basis and statute, "Americans with Disabilities Act of 1990", indicated on the Charging Party's initial information. (See Attached). The Fifth Circuit went as far as to say, "[w]orth noting is that there was no continuation sheet for t his narrative filed, nor a supplemental documents of any kind in the trial record," Order affirming Summary Judgment, page 19.[7]

[7] This amended charge was attached as Exhibit "B" to Plaintiff's Original Complaint.

The Fifth Circuit applied the law of another Circuit, misinterpreted it and misinterpreted the facts, specifically that Miller did not supply a continuation sheet or amendment. This Honorable Court has not ruled as to whether when Plaintiff fails to mark a box for retaliation but supplies information to the EEOC indicating such a claim whether administrative remedies are exhausted. Therefore, Petitioner Miller prays this Writ be granted.

The second important area of Federal law that has not been decided by this Court is whether restrictions on overtime qualify as a substantial limitation to one's ability to work. In its Order affirming Summary Judgment at page 12, the Fifth Circuit determined that courts have held that the inability to work overtime is not a substantial limitation on the ability to work under the ADA. *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593 (2002). The Court of Appeals also cited *Brennan v. Nat'l Tel. Directory Corp.*, 850 F.Supp. 331 (E.D. Pa. 1994), for its premise that the inability to work overtime hardly makes a plaintiff handicapped. While one of these cases is from a sister circuit and one from district court, neither address the issues in Miller's case. Both cases cited by the Fifth Circuit involve situations where there are overtime restrictions but no evidence of overtime. In Miller's case, the overtime restrictions were significant as he was only allowed to work 50 hours per week and was required to work 84. As this Court has never addressed the issue of whether restrictions of overtime in a mandatory overtime situation constitute a substantial limitation on an individual's ability to perform the major life task of working, Petitioner Miller prays this Court grant this Petition for Writ.

Therefore, the United States Court of Appeals for the Fifth Circuit decided an important issue of law that should

properly be decided by this Court and this Petition should be granted.

B. *The Standard Necessary to Survive Summary Judgment/Application of Law.*

1. Miller established a *Prima Facie* Case of Discrimination and Retaliation pursuant to the Americans with Disabilities Act

Plaintiff has offered evidence to this Court that 1) he is disabled or is regarded as disabled; 2) that he is qualified for the job; 3) that he was subject to an adverse employment action on account of his disability or perceived disability; and 4) that he was replaced by or treated less favorable than non-disabled employees. *McInnis v. Alamo Community College Dist.* 207 F.3d 276 (5th Cir. 2000). Defendant has stipulated that Plaintiff was qualified for his job and that an adverse employment action occurred.

Plaintiff fulfills the required elements to prove a *prima facie* discrimination case. Plaintiff has established that he was regarded as having a disability and that he was treated less favorably than a non-disabled employee. The adverse employment action occurred because of the disability. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112 (5th Cir. 1998) *citing* 42 U.S.C. § 12112(a). First, Plaintiff must offer evidence that he falls within the meaning of "disabled". *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996).

Plaintiff must establish that he has a disability or is qualified as disabled by one of three ways: Plaintiff must show that (1) he has a physical or mental impairment that substantially limits one or more major life activity, or (2) a

record of such impairment, or (3) that Defendant regarded him as having such an impairment. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112 (5th Cir. 1998). Plaintiff is only required to satisfy one prong of this test but he can clearly meet at least two.

First, Defendant regarded Mike Miller as disabled. The evidence that Defendant regarded Plaintiff as being disabled is powerful and overwhelming. As shown previously, a reasonable jury could find – indeed would be compelled to find – that the Plaintiff meets the definition of disabled because Defendant Southwestern Bell regarded him as disabled. It was only after Miller returned from a six week disability leave, began to look tired after 10 hour days, and Miller gave his restriction of being able to only work 50 hours a week (in a mandatory 84 hour work week) that Defendant began the process of dismissing Miller. Miller's restriction of only 10 hours overtime might not normally seem significant. In the instant case, all Miller's comparators were required to work mandatory 12-hour day, seven day a week shifts. Miller informed Defendant that on the day of the Golden Glade job (less than three weeks after returning from disability leave) that he had chest pains, needed to rest and take medication that Defendant suspended and then fired Plaintiff for something that Dale Dugas freely admits is policy (attributing travel time and down time to certain jobs). Ms. Dugas admits in page 85 of her deposition that other technicians have arrived at a job site only to find the work already done, and that they attribute travel time and inspection time to that job and that these employees are not considered to be falsifying records.

Mike Miller had a physical impairment that substantially limited one of his major life activities, working. A major life activity includes "caring for oneself, performing

manual tasks, walking, seeing, hearing speaking breathing, learning and working." 29 C.F.R. § 1630.2. Plaintiff was substantially limited because he was restricted as to the duration under which he could perform that life activity, working. 29 C.F.R. § 1630.2. This is a substantial limitation because out of an 84 hour work week, Miller could only work 50 – almost part time under the service emergency.

Put simply, Defendant may not fire Mike Miller because it perceived him to be disabled regardless of whether Plaintiff asked for, or received, an accommodation (the overtime restriction or the rest on September 21, 1998 because of the chest pains).

Mike Miller may have had no impairment at all but Defendant treated him as having a substantial limiting impairment. *McInnis v. Alamo Community College Dist.*, 207 F.3d at 281. Miller clearly demonstrated to the District Court that his impairments, as perceived by Defendant, were substantially limiting.

Miller has shown this Court that he made a *prima facie* case that he was discriminated against because he was regarded as disabled and summary judgment at the District Court level was not merited.

2. Defendant does not have a legitimate business reason to explain why it dismissed Miller after 24 years of work

Unfortunately, once the smoke clears, there is nothing left of this defense but a lingering and distasteful smell.

Defendant asserts in its motion and supporting evidence that Defendant fired Plaintiff for violations of the Code of Business Conduct, specifically that Plaintiff falsified documents. Plaintiff did not falsify documents. Plaintiff merely followed company policy with regard to keeping track of his time.

As a service technician, Plaintiff was required to keep time reports even though he did not charge actual funds for jobs. The term "charging time" refers to the time reports, not to actual billing of clients as no clients are actually billed. When charging time, employees would begin charging time to the new job as soon as they completed the old job. Employees had discretion to charge time for travel, cleaning the truck and gassing up the vehicle. For instance if Plaintiff cleaned his truck in the afternoon and gassed it up he would probably charge the time to the last job of the day even though Plaintiff had not done any work on that specific job. All service technicians were instructed as such. Dale Dugas again agrees with Plaintiff as was evidenced during her deposition.

> Q. Okay. And there are situations from time to time where a technician will get to a job and then somebody has already done the work; is that right? A. On occasions. Q. And they still attribute the time to travel time and the getting out and inspecting and checking to see if there's something wrong, correct? A. The time—you're talking about hours they report? Q. Yes, ma'am. A. Yes. Q. And you wouldn't say they're falsifying records, are you? A. As far as the time, no.

Deposition of Dale Dugas, page 85.

When Defendant offers the general description of its time keeping policies for service technicians, Plaintiff is in compliance. Defendant can offer no evidence that Plaintiff did not comply with its policies with regard to time keeping other than the fact that Plaintiff may not actually have repaired the job at Golden Glade. However, according to the time keeping policy, Plaintiff is not required to repair the job. Dale Dugas admitted in her deposition that many factors (i.e., travel, cleaning the vehicle) go into record keeping. She even admitted that the technicians had complete discretion as to which job to attribute it to. Not only did Defendant not have a legitimate reason to fire Plaintiff, according to Plaintiff's own supervisor, Plaintiff followed the procedures to a "T". At the very least, the issue of whether Plaintiff complied with company policy regarding time keeping is not a matter of law but rather a matter of fact for the jury.

3. Miller has established a *Prima Facie* Case of Retaliation

In paragraph 6.6 of Mike Miller's Amended Original Complaint, he asserted that he was retaliated against for engaging in a protected activity. Defendant does not dispute that Miller engaged in a protected activity by seeking accommodations for his overtime restrictions. In fact, in its Motion for Summary Judgment, Defendant failed to address Plaintiff's retaliation claims and as such, at the very least, that claim should have survived for trial before a jury. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). As Miller as shown, *supra,* he did exhaust his administrative remedies.

Plaintiff has shown this Court that he engaged in protected activity (by requesting accommodations via restrictions from his doctor) and that he suffered an adverse employment action. *Webb v. Cardiothoracic Surgery Ass'n.*,

139 F.3d 532 (5th Cir. 1998). All that is left for Plaintiff to show is that there was a causal connection between that protected activity and the adverse employment action. *Id.*

In establishing the causal link between Plaintiff's protected activity and Defendant's adverse employment action, Plaintiff must simply prove that either a discriminatory reason more than likely than not motivated Defendant, or by showing that the proffered legitimate reason is unworthy of credence. *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340 (5th Cir. 1985). The burden of proving the causal link is much less stringent than proving that Plaintiff's protected activity was the sole motivating factor for the Defendant's adverse employment action. *Long v. Eastfield College*, 88 F.3d 300(5th Cir. 1996).

The Fifth Circuit has held that the timing of the protected activity and the bad event or adverse action can be a significant factor. *Mayberry v. Voight Aircraft Co.*, 55 F.3d 1086 (5th Cir. 1995). Miller engaged in the protected activity of requesting accommodations by way of overtime restrictions three weeks after coming back from major heart surgery. Miller need not show the Court that the protected activity was the sole motivating factor for the adverse action, but he must show that "but for" the protected activity, he would not have been subjected to the adverse employment action. *Nowlin v. Resolution Trust Corp., 33 F.3d 498* (5th Cir. 1994).

4. **Inference of Retaliation**

On June 12, 2000, the United States Supreme Court issued its opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Although *Reeves* is an age discrimination case, the method of proof in an age discrimination case is similar to the method of proof used in

a retaliation case arising under the ADA *and* therefore, a review of *Reeves* will be helpful at bar. In *Reeves*, the plaintiff successfully sued his employer for age discrimination after he was terminated from his position as a hinge-department supervisor in a toilet seat plant. He was 57 years old at the time and had worked at the plant for 40 years. This Court vacated the trial court verdict in Reeves' favor holding that Reeves did not offer enough proof of an illegal bias. The Supreme Court overturned the decision because Reeves introduced enough evidence to show discrimination based on the *prima facie* case and evidence to show that the proffered reason was false. The Supreme Court unanimously held that a jury can, but is not required, to find intentional discrimination from a plaintiff's *prima facie* case and evidence that the proffered reason for terminating the plaintiff was false.

IV

CONCLUSION

Michael Miller has shown this Court that at least one if not two important federal questions of law should be, but have not been decided by this Court and that compelling reasons exist to do so. Michael Miller has met his *prima facie* case of discrimination and retaliation and offered evidence to rebut the "legitimate" business reason offered by Southwestern Bell Telephone Company for its actions toward Michael Miller. Michael Miller respectfully requests that his Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-21318
Summary Calendar

[Filed October 7, 2002]

MICHAEL L. MILLER, Plaintiff-Appellant,	)
v.	)
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant-Appellee	)

Appeal from the United States District Court
for the Southern District of Texas
No. H-00-1869

Before KING, Chief Judge, and WIENER and PARKER, Circuit Judges. PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

OPINION

Plaintiff-Appellant Michael L. Miller appeals from the district court's decision granting summary judgment to Defendant-Appellee Southwestern Bell Telephone Company ("SWBT") on Miller's claims for disability discrimination and retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12101 (1994) ("the ADA") For the reasons set forth below, we AFFIRM the district court's grant of summary judgment to SWBT.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-Appellant Miller is a fifty-three year-old male who has been employed by SWBT since 1974. Miller began his career at SWBT as a cable splicer's helper and, by 1998, had advanced within the company ranks to the position of customer service technician, or "CST." Also by 1998, Miller had developed a condition called spondylolisthesis, which is the displacement of vertebrae, as well as arthritis in both of his knees. In addition to these maladies, Miller suffered from a heart condition that required surgery in 1994,1996, and 1998.

While working at SWBT, Miller received disciplinary action from his employer on several occasions. On January 11, 1993, SWBT suspended Miller for one day, with pay, for shopping at an Academy Store during a period of time in which he should have been working. In May 1997, SWBT gave Miller a written reprimand for failing to allot the actual amount of time he worked on his time report.

The record indicates that Miller's case of spondylolisthesis and arthritis of the knees did not impede his ability to perform in his occupational capacity at SWBT. After

undergoing heart surgery, Miller returned to his CST position in September 1998. Following his return to work, Miller's physician provided Dale Dugas, Miller's immediate supervisor, a written note indicating the limitations of Miller's post-operation work schedule. According to physician's orders, Miller was permitted to work forty hours per week plus ten hours of overtime without physical restriction, but only under the condition that Miller received two consecutive days off per week. When Miller initially returned to work, Dugas scheduled Miller to work six days (excluding Sundays), but altered the schedule to allow him to work no longer than fifty hours with two consecutive days off per week. Miller concedes that SWBT fully accommodated the physician's proposed work schedule.

On November 10, 1998, SWBT fired Miller for misrepresenting his time reports because, according to SWBT, he indicated on his reports that he performed work that he never performed. SWBT eventually replaced Miller with a fifty-six year-old male. Miller maintains that he did not falsify his time report on September 21, 1998, but instead designated the time taken for travel, cleaning, and gassing his vehicle, on his time report.

On October 21, 1999, Miller filed a charge with the Equal Employment Opportunity Commission ("EEOC"), claiming that he was discriminated against on account of his age and disability. Miller received a right to sue letter from the EEOC on April 20, 2000. Miller filed the instant action in the United States District Court for the Southern District of Texas on June 5, 2000, alleging, *inter alia,* (i) that SWBT violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1994) ("ADEA") because age was a

motivating factor and made a difference in the decision to replace Miller with a person that was younger and less-qualified; (2) that SWBT violated the ADA by discriminating against and treating Miller in a light less favorable than its non-disabled workers; (3) that SWBT retaliated against Miller because he had informed SWBT of his disability and asserted his rights under the ADA; (4) that SWBT acted intentionally or with reckless disregard to cause Miller severe emotional distress; and (5) that Miller violated the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1994) ("FLSA").

In response to Miller's complaint, SWBT moved for summary judgment on August 31, 2001, arguing (i) that Miller's ADA and ADEA claims should be dismissed because he could not establish a prima facie case of discrimination; (2) that SWBT had provided a legitimate, non-discriminatory reason for dismissing Miller; and (3) that Miller could not show that SWBT's legitimate, nondiscriminatory reason for his dismissal was a pretext for discrimination. SWBT also urged summary judgment on Miller's infliction of emotional distress claims, asserting that he could not provide evidence of either severe emotional distress or intentional or reckless conduct.

In its Memorandum and Order of October 22, 2001, the district court awarded summary judgment in favor of SWBT on all claims, finding that Miller had not demonstrated a prima facie case of discrimination or retaliation under either the ADA or the AEDA, and that he had failed to adduce evidence of extreme and outrageous conduct supporting the intentional infliction of emotional distress or FLSA claims. The district court then dismissed Miller's case with prejudice.

Miller timely appeals the district court's grant of summary judgment on his disability discrimination and retaliation claims under the ADA.[1]

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment to SWBT *de novo,* applying the same standards as the district court. *Rivers v. Cent. & S.W. Corp.,* 186 F.3d 681, 683 (5th Cir. 1999). Summary judgment is appropriate if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). A factual dispute is genuine when a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

The substantive law dictates which facts are material, *Stewart v. Murphy*, 174 F.3d 530, 533 (5th Cir. 1999), and an issue is material if its resolution could affect the outcome of the action, *Anderson*, 477 U.S. at 248. Moreover, in summary judgment proceedings, the record is considered in the light most favorable to the non-moving party. *Dupre v. Charter Behav. Health Sys. of Lafayette, Inc.*, 242 F.3d 610, 613 (5th Cir. 2001) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-66 (1986). Summary

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[1] This court need not address whether plaintiff raised a genuine issue of material fact regarding his claims for discrimination under the ADEA, infliction of emotional distress, and violation of the FLSA. Miller waived review of these issues by not incorporating them into the Argument of his Brief. *See, e.g., Sherrod v. Am. Airlines*, 132 F.3d 1112, 1119 n.5 (5th Cir. 1998) (citing cases and FED. R. APP. P. 28).

judgment is ultimately appropriate if the non-movant fails to establish facts supporting an essential element of his prima facie claim. *Mason v. United Air Lines*, 274 F.3d 314, 316 (5th Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

III. MILLER'S ADA CLAIM BASED ON REGARDED DISABILITY

The ADA prohibits discrimination by private employers against any qualified individual with a disability. *See, e.g., Dupre*, 242 F.3d at 613. When claiming discrimination based on disability, a plaintiff must establish that: (1) he was disabled; (2) he was none-the-less qualified to do the job; (3) an adverse employment action was taken against him; and (4) that he was replaced by or treated less favorably than non-disabled employees. *E.g., id.* If a plaintiff can assert a prima facie case for disability discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action; should the employer succeed in doing so, the burden the shifts back to the plaintiff to establish that the articulated reason was merely a pretext for discrimination. *McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 282 (5th Cir. 2000).

An individual qualifies as disabled under the ADA if he demonstrates: (1) he has a physical or mental impairment that substantially limited one or more of his major life activities; (2) he has a record of such impairment; or (3) he is regarded as having such an impairment. *E.g., Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001); *McInnis*, 207 F.3d at 279-80.

When asserting a regarded disability, a plaintiff such as Miller is required to demonstrate that his employer mistakenly believed that either (1) he had a physical impairment that substantially limited one or more major life activities; or (2) he had an actual, non-limiting impairment that substantially limits one or more major life activities. *Aldrup*, 274 F.3d at 287 (citing *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999)). Under each of these scenarios, an employer must "entertain some misperception regarding the individual-either that he has a substantially limiting impairment that he does not have or the impairment is not so limiting as believed." *Id.*

On appeal, Miller insists that his employer regarded him as suffering a physical impairment that substantially limited a major life activity.[2] Hence, the key inquiry is whether SWBT mistakenly perceived that Miller had an impairment that substantially limited his major life activity of "working."[3] The Supreme Court recently reemphasized that

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[2] Miller does not argue that SWBT had the mistaken perception that he had a substantial, non-limiting impairment.

[3] The Supreme Court has defined major life activity as those activities that are "of central importance to daily life." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 691 (2002). Examples of major life activities include speaking, breathing, learning, and working. *E.g.*, *Aldrup*, 274 F.3d at 286. Throughout this litigation, Miller has asserted only that his major life activity of working has been implicated. Had Miller asserted another major life activity, the analysis on substantial limitation would be drastically different. *Williams*, 122 S. Ct. at 693. ("*Sutton* did not suggest that a class-based analysis should be applied to any major life activity other than working.").

when working is the major life activity under consideration, the statutory phrase "substantially limits" requires a plaintiff to allege that he was unable to work in a broad range or class of jobs, rather than one specific job. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, - - -, 122 S. Ct. 681, 692 (2002) (quoting *Sutton*, 527 U.S. at 491). Combining the relevant analytical criteria yields the following standard, which is directly applicable to the instant case: To demonstrate that SWBT regarded him as disabled, Miller must produce evidence that SWBT mistakenly believed that he had an impairment that made him unable to work in a broad class or range of jobs, as opposed to one specific job.

In granting summary judgment to SWBT, the district court determined that Miller had not met the requirements for being regarded as having a disability. The trial court found that Miller had not offered sufficient evidence to raise any inference that SWBT believed that Miller's Impairments would substantially limit him in the major life activity of working. This precluded Miller from successfully asserting his prima facie case for disability discrimination. The court also concluded that even had Miller established a prima facie case, he still would not have been able to advance a viable claim that SWBT's legitimate, non-discriminatory reason was a mere pretext for discrimination. We find it unnecessary to discuss whether SWBT's proffered reason was nondiscriminatory because it is quite clear that Miller did not fulfill his initial burden of meeting his prima facie case for disability discrimination.

Miller asserts that he can fulfill his summary judgment burden by demonstrating that SWBT did regard him as being

disabled prior to his termination.[4] He offers the following arguments for consideration: that it was only after he returned from six-week disability leave that SWBT began the process of dismissing him; that he was substantially limited because he was restricted as to the duration he could work under the physician's orders, and his work schedule was thus cut from eighty-four hours per week to fifty; and that three weeks afer his return from disability leave, upon his request for rest and medication, he was suspended and then fired.

On the other hand, SWBT contends that the summary judgment evidence established that SWBT did not regard Miller as having an impairment that substantially limited a major life activity. SWBT also asserts that an employer should not be held liable under the ADA for "regarding" an individual with having a disability where the employer merely relies upon restrictions placed upon the employee by the

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[4] In his Brief, Miller asserts that he can "clearly meet at least two" of the factors, i.e., that he had a substantially limiting physical impairment (actually disabled) and that he was regarded as such, that would qualify him as disabled. However, he offers no real support for this contention. The district court recognized that Miller did not contend that he was actually disabled, but only that SWBT regarded him as disabled, and therefore did not rule on the actual disability. Further, on appeal, Miller states that he "may have had no impairment at all but Defendant treated him as having a substantial limiting impairment." Given this statement, it appears that Miller is not taking his claim of actual disability very seriously; but in the unlikely *circumstance* that he were, this argument cannot be asserted for the first time on appeal since Miller's initial argument on the issue was insufficient for the district court to rule on it. *See, e.g., Brown v. Ames*, 201 F.3d 654, 663 (5th Cir. 2000).

employer. It argues further that Miller was allowed to work as a fully functioning CST without any restrictions beyond those prescribed by his doctor

Viewing any factual disputes in the light most favorable to the nonmoving party, we will assume that all of Miller's allegations are true. However, even in the light most favorable to him, Miller's contentions fall short of raising a genuine issue of fact. Initially, Miller fails to adduce evidence to support a claim that SWBT believed that he was unable to participate in a broad range of jobs. He does not even appear to introduce evidence that SWBT believed that he was unable to participate in one specific job, as he was allowed to continue working as a CST subsequent to his return from disability leave. Moreover, Miller's supervisor Dugas testified that it was his understanding that Miller had difficulty with his knees if he squatted for too long and his back hurt if he sat for long periods of time. Miller does not dispute the additional testimony in which Dugas indicated that these kinds of complaints were not unusual from members on his crew, and therefore he did not perceive these physical ailments as significantly limiting.

The fact that Miller was terminated weeks after his return and that he was suspended after his request for rest and medication does not sufficiently establish that SWBT believed that he was unable to work a broad range of jobs. While his termination may (merely in a circumstantial sense) indicate that SWBT believed that he was unable to be employed as a CST, this .... does not sufficiently raise a genuine issue as to whether SWBT believed that Miller was unable to work in a range of occupational positions. *See Dupre*, 242 F.3d at 616 (denying plaintiff's regarded disability claim even though

defendant fired plaintiff because "an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes the employee is incapable of performing a particular job").

Miller's assertion that he suffered a substantial limitation on his ability to work because instead of laboring for his usual eighty-four hour week, he had to work fifty, is equally problematic. When evaluating the traditional forty-hour work week, courts have determined that the inability to work overtime is not a substantial limitation on the ability to work under the ADA. *E.g., Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598-99 (6th Cir. 2002) (citing cases); *see also Brennan v. Nat'l Tel. Directory Corp.*, 850 F. Supp. 331, 343 (E.D. Pa. 1994) ("The inability to work overtime hardly makes a plaintiff handicapped."). In addition, this argument does not address the critical issue of whether Miller's supervisors regarded him as being unable to work a broad range of jobs. Indeed, the uncontroverted evidence indicates that Miller's supervisor believed that he could and would, despite his physician's directions, exceed his allotted work time.

Further, SWBT cannot be considered to have regarded Miller as being disabled simply because of its receipt of the note from Miller's physician. Significantly, Miller forgets that the standard for regarded disability hinges on the mistaken belief of impairment. "[I]f the employer's belief [about the employee's condition] corresponds to the employee's or his physician's description of his limitations, the employer cannot be viewed as improperly regarding him as disabled." *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 863 (S.D. Tex. 2001). Even assuming arguendo that this evidence

satisfactorily raises the issue of SWBT's belief of his impairment, Miller's introduction of the doctor's note is ultimately counterproductive to his cause because it suggests that SWBT was correct, i.e., not mistaken, to assume some sort of impairment.

Because Miller has not demonstrated that SWBT regarded his physical condition to substantially limit his ability to perform the major life activity of working during his tenure at SWBT, a reasonable jury could not find that he was qualifiedly disabled. Miller's failure to introduce facts supporting this essential element of his prima facie claim of disability discrimination indicates that the trial court acted properly in granting summary judgment to SWBT on Miller's claim of disability discrimination.

IV. MILLER'S CLAIMS BASED ON RETALIATION

Miller also asserts that he suffered unlawful retaliation for participating in an act protected by the ADA. On this claim, we find it important to delve into issues that are more procedural in nature than those discussed by the district court. SWBT has asserted both at the trial level and on appeal that Miller failed to exhaust his administrative remedies as to his claim for retaliation. Throughout the course of this litigation, Miller, for reasons unknown to this court, has completely disregarded this line of argument. Miller's failure to articulate some modicum of rebuttal argument on this point proves injurious to his cause, as the failure to exhaust administrative remedies serves as an independent basis to affirm summary judgment. *See Randel v. United States Dep't of Navy*, 157 F.3d 392, 395 (5th Cir. 1998) (stating that a plaintiff asserting

racial discrimination must exhaust his administrative remedies on the claim before seeking review in federal court).

The trial court did not rule on this issue, instead opting to evaluate the substantive requirements of Miller's retaliation claims, concluding eventually that he failed to raise a genuine issue of material fact on one element of his prima facie case. Since we conclude that the district court lacked jurisdiction to consider Miller's retaliation claim on the merits, we need not address the merits.

The jurisdictional problem here relates to the fact that in the charge Miller filed with the EEOC, he did not check the box corresponding with "retaliation," but did so for "age" and "disability." From a procedural standpoint, SWBT argues, Miller only properly raised allegations of intentional discrimination under the ADA and the ADEA. Citing a number of cases, SWBT asserts that because the alleged retaliation in the instant case occurred before Miller filed the initial EEOC charge, Miller should have exhausted his administrative remedies on that claim prior to filing.

Given this argument, directly at issue is whether Miller's failure to fill in the appropriate box for retaliation, when he already marked the box for disability and age discrimination, compels the conclusion that he failed to exhaust his administrative remedies before filing a lawsuit under the ADA. A review of this case using the same standards as the lower court produces the same exact outcome, but on a dissimilar basis: Summary judgment is appropriate because Miller failed to exhaust his administrative remedies on his claim for retaliation.

There are several reasons why we believe this the correct outcome in this matter. First, the federal anti-discrimination statutes, most notably, Title VII have consistently required claimants to fill in the appropriate corresponding boxes when filing their claim for unlawful employment action. *See, e.g., Price v. Harrah's Md, Heights Operating Co.*, 117 F. Supp. 2d 919, 921-22 (E.D. Mo. 2000) (granting summary judgment on failure to exhaust administrative remedies grounds for employer because plaintiff did not check the box for retaliation and did not specifically allege retaliation in the text of the charge); *McCray v. DPC Indus., Inc.*, 942 F. Supp. 288, 294 (E.D. Tex. 1996) (informing that when asserting a claim for discrimination under Title VII, it is necessary for the appropriate box be checked in the EEOC claim).[5] By simply checking the box corresponding to the alleged basis for unlawful employment action, a plaintiff sufficiently exhausts his administrative remedies prior to a Title VII lawsuit. *See, e.g., id.*

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[5] It is well-established that summary judgment may be granted against a non-movant solely on the basis of failure to exhaust administrative remedies. *E.g., Inst. for Tech. Dev. v. Brown*, 63 F.3d 445, 447 (5th Cir. 1995). The Supreme Court has held that a plaintiff may not bring claims in a lawsuit that were not included in the filed EEOC charge. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). This requirement serves to enhance the administrative enforcement process by ensuring that the EEOC can conduct a full investigation while also providing the employer with advanced notice of the claim and an opportunity to resolve the dispute. *See Harper v. Godfrey Co.*, 45 F.3d 143, 148 (7th Cir. 1995).

Second, the same procedural requirements for Title VII have been interpreted to apply to EEOC charges filed under the ADA as well. This court has also held that the ADA incorporates by reference the administrative procedural requisites found in Title VII, *Dao v. Auchan Hypermarket*, 96 F.3d 787, 789 (5th Cir. 1996), and that adherence to these prerequisites is necessary: prior to commencing an ADA action in federal court against an employer, *id.* Although this court has not addressed the issue of whether an ADA case cab be dismissed for failure to fill in the appropriate box, other courts encountering this issue support the granting of summary judgment. *See, e.g., Talbot v. U.S. Foodservice, Inc.*, 191 F. Supp. 2d 637, 640 (D. Md. 2002) ("Where a litigant has neither checked the box for discrimination, nor mentioned disability discrimination or the ADA anywhere in his charge of discrimination, the EEOC cannot reasonably have been expected to have investigated disability discrimination."); cases cited *infra*. Hence, the "box filling" requirement cited by SWBT appears to arise in the ADA context as well as the Title VII context.

Third, one of our sister circuits has indicated that in the ADA context, a plaintiff's failure to fill in the appropriate box in the filed charge, coupled with the inability to describe the general nature of the claim in the narrative section of the charge, forms a sufficient basis for summary judgment. The Seventh Circuit decided that when a plaintiff fails to mark the appropriate box for "retaliation" but continues to seek relief for disability discrimination and retaliation, the plaintiff has nevertheless failed to exhaust his administrative remedies as to the retaliation claim. *Cable v. Ivy Tech State College*, 200

F.3d 467, 477 (7th Cir. 1999).[6] The *Cable* court observed that the body of the plaintiff's EEOC charge did not even "hint at retaliation, much less develop [a] factual basis for the claim." *Id.* Even when viewed in the light most favorable to the plaintiff, the statement of discrimination did not implicate the behavior that plaintiff asserted to be the basis of his retaliation claim. *Id.* The Seventh Circuit deemed the plaintiff's narrative to have given insufficient indication to the EEOC or the employer that he was also seeking redress for unlawful retaliation. *Id.*

In affirming summary judgment on plaintiff's retaliation claim, the *Cable* court found that there was no indication from the EEOC charge boxes, narrative, or supplemental material that the plaintiff sought redress for the retaliation claim, or even, for the matter, that the alleged retaliation "was like or reasonably related to" his statutory rights stemming from the ADA. *Id.; see also Thompson v. KN Energy, Inc.*, 177 F. Supp. 2d 1238, 1254-55 (D. Kan. 2001)(granting summary judgment against plaintiff for failing to exhaust administrative remedies under the ADA when marked boxes for "sex" and "disability" but not "retaliation"). The similarity between *Cable* and the instant case is marked, particularly with the absence of narrative or other supplemental EEOC materials indicating that Miller was seeking redress for unlawful retaliation, The information, or

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[6] In his EEOC charge, Cable checked the "Other" box only, but did not write in the narrative portion of the claim that he was discriminated against on the basis of his disability.

lack thereof,[7] included on Miller's filed EEOC charge creates a strong presumption in favor of a finding of failure to exhaust administrative remedies.

Further compounding the difficulty for Miller is the timing of the alleged retaliation and his filing of the complaint. Miller would be able to file a supplemental or additional charge if the retaliation claim, in the parlance of this court, "grow[s] out" of his claims for disability. *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. Unit A Aug. 1981). SWBT is correct to emphasize that the alleged adverse employment action prompting Miller's claim for retaliation occurred prior to the filing of his discrimination charge. Since

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[7] The entirety of Miller's narrative reads as follows:

I. On or about November 10, 1998, I was discharged from the position of Customer Services Technician. Respondent is public telephone system.

II. On or about November 10, 1998, Ernie Carey, Division Manager, Installation and Repair, informed me that I was discharged for allegedly falsifying a time report and a form called 6218, trouble ticket.

III. I believe that I was discriminated against because of my age, 48, in violation of the Age Discrimination in Employment Act of 1967.

Worth noting is that there was no continuation sheet for this narrative filed, nor a supplemental document of any kind in the trial record.

the alleged retaliation occurred prior to his filing of the complaint, Miller was well aware of the conduct and actions that would give rise to his claim of retaliation under the ADA. Given these factual circumstances, Miller's retaliation cause of action would not fall under the *Gupta* exception; thus he is precluded from filing a new EEOC charge based on disability. *See id.*

Despite the trial court's disregard of this issue, SWBT persisted in its failure to exhaust administrative remedies argument. This court concludes that because Miller did not check the check the correct box on the EEOC complaint form or otherwise disclose his retaliation claim and thereby exhaust its administrative remedies, he is procedurally precluded from asserting a retaliation claim under the ADA.

V.CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1869

[Filed November 20, 2001]

MICHAEL L. MILLER,	)
Plaintiff,	)
	)
v.	)
	)
SOUTHWESTERN BELL	)
TELEPHONE CO.,	)
Defendant.	)
	)

MEMORANDUM AND ORDER

Plaintiff Michael Miller ("Miller") moves for Rehearing and Reconsideration of Summary Judgment (Entry #36) entered on behalf of Defendant. See Final Judgment (Entry #35). Miller maintains that entry of Judgment in favor of Defendant Southwestern Bell Telephone Co. (" SWBT") was improper, as genuine issues of material fact were presented indicating that SWBT discriminated against Miller because he was regarded as disabled; and, that SWBT retaliated against Miller. See Plaintiff's Motion for Rehearing and Reconsideration (Entry #36). The Court, having reviewed

the motion, finds that it lacks merit, as it fails to persuade that the Court erred in finding that Miller failed to show that genuine issues of material fact existed because among other things, he did not demonstrate that his impairments were perceived, by SWBT, as substantially limiting, see *McGinnis v. Alamo Community College Dist.*, 207 F.3d 276, 281 (5thCir. 2000); *Deas v. River West, L.P.*, 152 F.3d 471,476 n.10 (5th Cir. 1998); or, that Miller suffered an adverse employment action causally connected to a protected activity and, therefore, suffered retaliation. See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 359-60 (1995); *Chaney v. New Orleans Public Facility Management*, 179 F.3d 164, 168 (5th Cir. 1999). It is, therefore,

ORDERED that Miller's Motion for Reconsideration and Rehearing (Entry #36) is **DENIED**.

The Clerk of Court shall file this Memorandum and Order and provide the parties a true copy.

SIGNED at Houston, Texas, on this the 19th day of November, 2001.

/s/ _____
Calvin Botley
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1869

[Filed October 24, 2001]

MICHAEL L. MILLER,	)
Plaintiff,	)
	)
v.	)
	)
SOUTHWESTERN BELL	)
TELEPHONE CO.,	)
Defendant.	)
	)

FINAL JUDGMENT

Following this Court's review of this matter, as recited in the Memorandum and Order (Entry #31) and for the reasons set forth therein, it is

ORDERED that Defendant Southwestern Bell Telephone Co.'s ("SWBT") Motion for Summary Judgment (Entry #24) is **GRANTED**. Further, it is

ORDERED that summary judgment is entered in SWBT's favor and this matter is **DISMISSED with prejudice** from the dockets of this Court.

The Clerk of Court shall file this Final Judgment and provide the parties with a true copy.

SIGNED at Houston, Texas, on this the 22nd day of October, 2001.

/s/ _____
Calvin Botley
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-00-1869

[Filed October 24, 2001]

MICHAEL L. MILLER, Plaintiff,	)
v.	)
SOUTHWESTERN BELL TELEPHONE CO., Defendant.	)

MEMORANDUM AND ORDER

Defendant Southwestern Bell Telephone Company ("SWBT") moves, pursuant to Rule 56(c), Fed. R. Cir, P., for summary dismissal of Plaintiff Michael L. Miller's ("Miller") employment discrimination lawsuit, in which Miller alleges that SWBT is culpable for intentional infliction of emotional distress, retaliation and violations of the Americans with Disabilities Act ("ADA") at 42 U.S.C. § 12102, *et seq.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216, *et seq.*, and the Age Discrimination in

Employment Act ("ADEA") at 29 U.S.C.§ 621, *et seq.* *See* Defendant's Motion for Summary Judgment (Entry #24) and Reply to Plaintiff's Response to Motion for Summary Judgment (Entry #30). SWBT maintains that Miller has failed to establish a *prima facie* case of age or disability discrimination and has no viable claims for retaliation or FLSA violations. *See id.* Miller contends that summary judgment would be improper as SWBT's attempts to articulate legitimate, non-discriminatory reasons for terminating his employment are a mere pretext for its actual discriminatory motives and, accordingly, requests that Defendant's Motion for Summary Judgment (Entry #24) be denied. *See* Plaintiff's Response to Motion for Summary Judgment (Entries #25 and #27).[1]

BACKGROUND

Miller, a fifty-three (53) year old male, began working for SWBT as a cable splicer's helper in March of 1974. By 1998, Miller had advanced with the company to the position of customer service technician ("cst") and developed spondylolisthesis,[2] arthritis in both knees and a heart condition, requiring surgery in 1994, 1996 and 1998. *See* Plaintiff's First Amended Complaint (Entry #17); affidavit of Miller (Entry #27). On January 11, 1993, Miller was

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[1] Michael L. Miller's affidavit in support of his Response to Motion for Summary Judgment (Entry #25) was submitted and filed as Entry #27, but on occasion may be referred to herein as if it were incorporated with the Response to Motion for Summary Judgment, as Entry #25.

[2] the displacement of a vertebrae.

suspended from work one day, with pay, for shopping at an Academy Store during a period of time he was to be working. *See* Miller deposition at p. 56, Exhibit B, Defendant's Motion for Summary Judgment (Entry #24). In May of 1997, Miller was given a written reprimand for failing to allot the actual amount of time he worked on his time report. *See* affidavit of Dale Dugas at para. 9, Exhibit C, Defendant's Motion for Summary Judgment (Entry #24).

Miller's spondylolisthesis and arthritis of the knees did not impede his ability to perform his job at SWBT. *See* deposition of Miller at pp. 146-147, Exhibit B, Defendant's Motion for Summary Judgment (Entry #24). In September of 1998, however, Miller returned to his cst position at SWBT, after undergoing heart surgery. *See* deposition of Dale Dugas at pp. 98-99, Exhibit B, Plaintiff's Response to Motion for Summary Judgment (Entry #25); affidavit of Dale Dugas at para. 3, Exhibit C, Defendant's Motion for Summary Judgment (Entry #24). Following his return to work, Miller's physician provided Dale Dugas ("Dugas"), Miller's immediate supervisor, a written note indicating that Miller was able to work fifty hours per week (including ten hours of overtime) with no physical restrictions, if Miller was allowed two consecutive days off. *See* affidavit of Miller at para. 4 (Entry #27). During a service emergency that followed shortly thereafter, Miller requested that he be allowed to work Sunday thru Friday, having Friday and Saturday off, rather than the customary twelve hour shifts, seven days per week that csts were required to work during emergencies. *See* affidavit of Miller at para. 5-6 (Entry #27). SWBT surmises that Miller sought to work on Sundays because that was a pay differential day, mandating pay at overtime computations. *See* affidavit of Dale Dugas, Exhibit C, Motion for Summary

Judgment (Entry #24). Initially, Dugas scheduled Miller to work six days (excluding Sundays) per week, but altered the schedule allowing him to work no longer than fifty hours per week with two consecutive days off. *See* deposition of Miller at pp. 149-150, Defendant's Motion for Summary Judgment (Entry #24). Miller concedes SWBT fully accommodated his physician's request to limit his work schedule to more than fifty hours (including ten hours overtime) with two consecutive days off.[3]

Miller was fired by SWBT on November 10, 1998, for indicating on time reports that he performed work (*i.e.*, drop cut - two pair) that he did not perform. *See* affidavit of Dugas at paras. 5-8, Exhibit C, Defendant's Motion for Summary Judgment (Entry #24); affidavit of David M. Mehaffey ("Mehaffey"), *id.* at Exhibit D; *see also* written and mechanized time reports at pp. 135-136, 141-148, attached to affidavit of Claire Milliken ("Milliken"), SWBT Senior Human Resources Manager, Exhibit E, Defendant's Motion for Summary Judgment (Entry #24). SWBT replaced Miller with a fifty-six (56) year old male. See affidavit of Dugas at para. 11, Exhibit C, Defendant's Motion for Summary Judgment (Entry #24). Miller maintains that he did not falsify his time report on September 21, 1998, but attributed the time taken for travel, cleaning and gassing his vehicle, to his time

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[3] Miller does not appear to urge that SWBT did not comply with his physician's suggested limitations of his work, but rather is contending that SWBT's refusal to allow him to work on Sundays like the other technicians, was discriminatory. *See* Miller's deposition at pp. 149-150, Defendant's Motion for Summary Judgment (Entry #24); *see also* Miller's affidavit, para. 6, Entry #27.

report. *See* affidavit of Miller at para. 10, Entry #27. On October 21, 1999, Miller filed a charge with the Equal Employment Opportunity Commission, contending that he was discriminated against because of his age and disability. *See* EEOC Charge at p. 3, Exhibit I, Defendant's Motion for Summary Judgment (Entry #24). Miller received his right to sue letter from the EEOC on April 20, 2000. *See id.* at p. 2. On June 5, 2000, Miller filed his lawsuit, invoking the Court's jurisdiction, in accordance with 28 U.S.C. § 1331.[4]

STANDARD OF REVIEW

The Motion for Summary Judgment

Summary judgment is proper if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corp v. Catrett,* 477 U.S. 317,322 (1986); see also *Fed. R. Cir. P. 56(c).* A factual dispute is "genuine" when a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); see also *PYCA Industries, Inc. v. Harrison County Waste Water Management District,* 177 F.3d 351,361 (5th Cir. 1999). The substantive law dictates which facts are material. See *Stewart v. Murphy,* 174 F.3d 530, 533 (5th Cir.), *cert. denied,* 528 U.S. 906 (1999); *Duplantis v. Shell Offshore, Inc.,* 948 F.2d 187, 189 (5th Cir. 1991). An issue is material if its resolution could affect the outcome of the action. *Anderson v. Liberty Lobby*

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[4] The parties consented to trial before a magistrate judge, in accordance with 28 U.S.C. § 636, the Cost and Delay Reduction Plan under the Civil Justice Reform Act and Rule 72, Fed.R. Cir. P. *See* Consent (Entry #16)

Inc., 477 U.S. at 248. Facts may be gleaned from reviewing the pleadings, answers to interrogatories, admissions and affidavits on File. See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)*(en banc)*. In deciding whether a fact issue has been created, the facts and any inferences to be drawn from them, must be viewed in the light most favorable to the nonmoving party, and questions of law are reviewed *de novo*. See *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133,, 120 S.Ct. 2097, 2110 (2000); *Merritt-Campbell, Inc. v. RxP Prods. Inc.*, 164 F.3d 957,961 (5th Cir. 1999); *Horton v. City of Houston*, 179 F.3d 188, 191 (5th Cir. 1999). If the summary judgment motion is properly supported, the nonmovant may not rest on mere allegations or denials, but must set forth specific and supported material facts, of significant probative value, establishing that there exists a genuine issue of material fact. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,586 (1986); *Hamilton v. Seque Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000); *Union Planters National Leasing Inc. v. Woods*, 687 F.2d 117, 119 (5th Cir. 1992).

DISCUSSION

I. The Fair Labor Standards Claim

Miller does not dispute SWBT's claim that he has failed to state a viable claim in alleging that SWBT has violated the Fair Labor Standards Act ("FLSA") by terminating his employment with the company. Despite Miller's allegation that SWBT is culpable for FLSA violations, Miller now contends that he is not asserting such claims. *See* First Amended Complaint, para. 1.3 (Entry #17); *but contra.* Plaintiff's Response to Motion for Summary

Judgment (Entry #25) at p. 1. Miller has failed to satisfy his burden of proving the FLSA violations, as plead. *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 636 (5th Cir. 2001). It is, therefore, determined that there is no genuine dispute as to any material fact with respect to Miller's allegation of FLSA violations and, accordingly, summary judgment as to this claim is proper.

II. The Discrimination Claims

A. Alleged Violations of the Americans With Disabilities Act (ADA)

The Americans with Disabilities Act ("ADA") prohibits discrimination to ensure that individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others toward individuals perceived to be disabled. See *Deas v. River West, L.P.*, 152 F.3d 471,482 (5th Cir. 1998), quoting *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 107 S.Ct. 1123, 1129 (1987). Miller maintains that he was terminated by SWBT, despite the fact that SWBT regarded him as disabled and that SWBT's conduct was in violation of the Americans with Disabilities Act. *See* Plaintiff's First Amended Complaint (Entry #17). SWBT seeks summary judgment, contending that Miller had no disability, was not terminated because of any disability and, accordingly, can make no *prima facie* case of discrimination under the ADA. Further, SWBT maintains that its belief that Miller falsified time reports, in violation of its Code of Business Conduct, applicable to all SWBT employees, provided SWBT with a legitimate, nondiscriminatory reason for firing Miller, for which Miller is unable to establish pretext. *See* Defendant's Motion for

Summary Judgment (Entry #24) and Reply to Plaintiff's Response to Motion for Summary Judgment (Entry #30); *see also* affidavit of Milliken at paras. 2-3, Exhibit E, Defendant's Motion for Summary Judgment (Entry #24).

(i) The Prima Facie Case

To establish a *prima facie* case of discrimination under the ADA, Miller must demonstrate that 1) he is disabled or is regarded as disabled; 2) that he is qualified for the job; 3) that he was subjected to an adverse employment action on account of his disability or perceived disability; and 4) that he was replaced by or treateded less favorably than non-disabled employees. See *McInnis v. Alamo Community College Dist.*, 207 F.3d 276, 279-280 (5th Cir. 2000); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir. 1997), *cert. denied* 522 U.S. 1084 (1998). If Miller is able to establish a *prima facie* case, the burden shifts to SWBT to articulate a legitimate, nondiscriminatory reason for the adverse employment action; and, if successful, the burden then shifts back to Miller to establish by sufficient evidence that the articulated reason was merely a pretext for unlawful discrimination. See *id.*, citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Miller must first establish that he is disabled or, was regarded by SWBT as being disabled. See *McInnis v. Alamo Community College Dist., id* at 280; *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1119 (5th Cir. 1998), quoting *Bridges v. City of Bossier,* 92 F.3d 329, 332 (5th cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 770 (1997).

The ADA defines the term "qualified individual with a disability" as someone who has a disability, but who, "with or without reasonable accommodation, can perform the

essential functions of the employment position that such individual holds or desires." *42 U.S.C. § 12111(8); Giles v. General Elec. Co.*, 245 F.3d 474,483 (5th Cir. 2001). SWBT does not dispute that Miller was qualified for his position or that he suffered a negative employment action when terminated. *See* Defendant's Motion for Summary Judgment (Entry #24). SWBT, however, denies that Miller was disabled or regarded as disabled, and that if Miller were to be found disabled, that the disability in anyway was a factor in his termination. *Id.* The ADA definition of "disability," with respect to an individual, means

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2); see also *Albertsons, Inc. v. Kirkingburg,* 527 U.S. __, 119 S.Ct. 2162, 2167 (1999).

SWBT does not dispute that Miller's back condition (spondylolisthesis), arthritis of the knees and heart condition constituted physical impairments, i.e., "a condition affecting one or more of the ... body systems..." See *Albertsons, Inc. v. Kirkingburg, id.;* 29 C.F.R § 1630.2(h)(1). SWBT maintains, however, that Miller's impairments do not substantially limit one or more of his major life activities and, accordingly, fail to rise to the level of "disabilities." Defendant's Motion for Summary Judgment (Entry #24).

SWBT points out that Miller returned from his heart surgery, in September of 1998, with no restrictions on his physical abilities to perform work, but merely with some limitations as to the overtime his physician recommended he perform. *See id,* deposition of Miller at pp. 136-140, 169, Exhibit B. Furthermore, SWBT argues that Miller concedes that his physical impairments did not limit his ability to perform his job, *see id.* at pp. 138-140, 146-47; and, that in seeking a transfer to a technician's position in February of 1998, Miller indicated on the Job Vacancy Request, that he was not disabled and required no accommodations. *See* Job Vacancy Request, Exhibit F-3, Defendant's Motion for Summary Judgment (Entry #24). Miller maintains, in rebuttal, that although he had no physical impairment that substantially limited one or more of his major life activities, he was regarded by SWBT as having such an impairment, and that this is evidenced by Dugas' acknowledgment that Miller returned from 'disability leave' in September of 1998, and that Dugas noticed Miller would tire when putting in overtime hours. *See* Plaintiff's Response to Motion for Summary Judgment at at pp. 7-9 (Entry #25); *see also* affidavit of Dale Dugas at paras. 3-4, Exhibit C, Defendant's Motion for Summary Judgment (Entry #24).

"A major life activity" includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2. The regulation further provides that an individual is "substantially limited" in a major life activity if he is:

> (i) [u]nable to perform a major life activity that the average person in the general population can perform; or

> (ii) [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. *29 C.F.R. § 1630.2*

Miller is not arguing that he was actually disabled but, merely regarded as disabled by SWBT. *See* Plaintiff's Response to Motion for Summary Judgment at pp. 7-9 (Entry #25). To determine, in this instance, whether Miller was regarded as having a disability by SWBT, Miller has the burden of establishing that he 1) has a physical or mental impairment that does not substantially limit major life activities, but was treated as such by SWBT; 2) has a physical or mental impairment that substantially limits one or more major life activities, but only because of the attitudes of others toward the impairment; or 3) has no actual impairment at all, but be treated by an employer as having a substantially limiting impairment. See *McGinnis v. Alamo Community College Dist.*, 207 F.3d at 281. Further, Miller must demonstrate that his impairments, if they existed as perceived, would be substantially limiting. See *id.; Deas v. River West, L.P.*, 152 F.3d at 476 (5th Cir. 1998).

Miller has adduced evidence indicating that he was off of work from July thru September, 1998, following an alcohol septal reduction surgical procedure to correct a physical impairment of his heart. *See* Exhibit A-3, Plaintiff's Response to Motion for Summary Judgment (Entry #25). Further, the

deposition testimony of Dale Dugas indicates that as his direct supervisor she was aware of Miller's heart impairment and that he had some difficulty with his knees and back. See *id.*, pp. 12-14, deposition of Dugas, Exhibit B. Miller, however, has not offered sufficient evidence to raise any inference that SWBT believed that Miller, because of his impairments, either singly or cumulatively, was either unable to perform a major life activity expected of the average person, or that he was significantly restricted as to the manner in which he could perform a major life activity. In other words, Miller has failed to demonstrate that his impairments, as perceived by SWBT, would be substantially limiting. Miller, himself, has testified that his physical impairments did not limit his ability to perform his job. *See* deposition of Miller at pp. 138, 14647, Exhibit B, Defendant's Motion for Summary Judgment (Entry #24). Further, Miller indicates that his physician's only limitation as to the manner he performed his job, was to limit the amount of time in excess of the average work week, to ten hours and to allow two consecutive days off. *See id.* at pp. 136-40, 169; *see also* affidavit of Miller at para. 4 (Entry #27). Miller offers nothing indicating that he was limited by his physician or by his impairments in any major life activity. More importantly, Miller fails to demonstrate that SWBT believed that he was substantially limited in the manner he could perform his job or any other major life activity. Dugas testified that it was her understanding that Miller had difficulty with his knees if he squatted for too long, and his back hurt if he sat for long periods of time. Dugas also indicated, however, that these were not unusual complaints from individuals on her crew, and she did not testify that she viewed these physical ailments as significantly limiting. *See* deposition of Dugas at p. 14, Exhibit B, Plaintiff's Response to Motion for Summary Judgment (Entry #25). The evidence

indicates that Dugas, in fact, felt that Miller could and would, despite his physician's directions, exceed the work time allotted Miller. *See id.* at paras. 3 and 4, affidavit of Dugas, Exhibit C. SWBT's absence of a belief that Miller was substantially limited in a major life activity is further bolstered by his indicating, on a job transfer request, that he was not disabled and requested no accommodations. *See id.*, Exhibit F-3. Miller's argument that Dugas perceived him to be disabled because she referred to his leave for surgery and recuperation as, "disability" leave, is specious at best, when at most Dugas' statement merely indicates that she was mistaken as to the type of leave he was on, as is evinced by Miller's use of both the terms, "medical" and "disability," when describing his leave. *See* affidavit of Miller at para. 3 (Entry #27). Dugas' use of the phrase disability leave, without more, does not infer that she believed Miller to be disabled.

Miller's failure to establish that his impairments were believed by SWBT to be significantly limiting, does not demonstrate that SWBT regarded him as disabled. See *McGinnis v. Alamo Community College Dist.*, 207 F.3d at 281; *Deas v. River West, L.P.*, 152 F.3d at 476, n. 10. Miller has, therefore, failed to make a *prima facie* showing that he was discriminated against by SWBT because he was regarded as disabled and, accordingly, summary judgment as to this issue is merited.

(ii) Defendant's Articulation of a Legitimate, Non-Discriminatory Reason For its Employment Action

If Miller had established a *prima facie* case, he would have created a presumption that SWBT discriminated against him in violation of the ADA. See *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 525 (1993); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981); *Bauer v. Albemarle,* 169 F.3d 962,966 (5th Cir. 1999). SWBT, in facing the *prima facie* case, would then have the burden of rebutting the presumption by articulating a legitimate nondiscriminatory reason that motivated its decision to terminate Miller. See *id.; Haynes v. Pennzoil Co.,* 207 F.3d 296, 300 (5th Cir. 2000). The Defendant's burden, however, is one of production only and not of persuasion. See *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. at 25556; *Evans v. City of Bishop,* 238 F.3d 586, 590 (5th Cir. 2000).

SWBT contends that it terminated Miller's employment because Miller falsely reported on a time report that he performed work on a customer account that he did not perform. Further, SWBT maintains that the false report of work performed is in violation of the employer's internal regulations for all employees. *See* affidavits of Dugas, Mehaffey and Milliken, Exhibits C, D and E, Defendant's Motion for Summary Judgment (Entry #25). SWBT's explanation for terminating Miller's employment, satisfies SWBT's burden to articulate a legitimate, nondiscriminatory reason for its actions. See *id.; Meinecke v. H & R Block,* 66 F.3d 77, 83 (5th Cir. 1995).

(iii) Plaintiff's Claim that Defendant's Reasons are a Mere Pretext for Discriminatory Motives

A prima facie showing by Miller, would have allowed him to establish that SWBT's articulated reasons for his termination, are a mere pretext for discriminatory conduct. See *Russell v. McKinney Hospital Venture,* 235 F.3d 219, 222-23 (5th Cir. 2000). Miller contends that he did not falsify any reports and that, with respect to the September 21, 1998 incident that generated his termination, he merely charged his travel time and the time needed to clean and gas his vehicle to the disputed account.[5] *See* affidavit of Miller at paras. 8-11 (Entry #27. Miller maintains that such time reporting is customary with SWBT csts. *Id.* at para. 9-10. Miller, however, was not terminated by SWBT for charging his travel and gas time to the customer account, but was fired for claiming that he performed work *(i.e.,* drop cut - 2 pair) that he did not perform. *See* Time Report at Exhibit E, bate stamp number 135; *see also* affidavits of Dugas, Mehaffey and Milliken at Exhibits C, D and E, Defendant's Motion for Summary Judgment (Entry #25). In light of previous similar infractions by Miller, SWBT's belief that he made false reports on the September, 1998 time record, would not prove unreasonable. Miller's claim that SWBT's advanced reason for terminating him, *i.e.,* the falsifying of the job performed on a time report, is a mere pretext for discrimination would not, therefore, be persuasive if Miller had established *a prima facie* case.

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[5] The time charged by Miller to the customer account is not utilized as a billing item, but is merely a time report, utilized by SWBT to account for the time of its csts. *See* Miller affidavit at para. 8 (Entry #27).

B. Alleged Violations of the Age Discrimination in Employment Act (ADEA)

The same burden-shifting framework advanced by *McDonnell Douglas,* as discussed with respect to Miller's ADA claim, is utilized to demonstrate his claims of violations of the Age Discrimination in Employment Act ("ADEA") at 29 U.S.C. § 621, *et seq.* Miller must first establish a *prima facie* case of age discrimination. SWBT must then respond by producing a legitimate, non-discriminatory rationale for its decision. Once SWBT offers a legitimate, non-discriminatory reason for Miller's termination, the burden shifts back to Miller to "raise a genuine issue of material fact as to whether the employer's proffered reason was merely a pretext for age discrimination." *Medina v. Ramsey Steel Co., Inc.,* 238 F.3d 674, 680 (5th Cir. 2001). "[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 148 (2000). If Miller is able to show that SBWT's justification for its employment decision is mere pretext for discriminatory conduct, that showing, together with Miller's *prima facie* demonstration, will be sufficient to survive summary judgment as to the claim of age discrimination. *Id.* at 142-43; see also *Auguster v. Vermilion Parish School Bd,* 249 F.3d 400, 402 (5th Cir. 2001); *Russell v. McKinney Hospital Venture,* 235 F.3d at 222-23.

(i) The Prima Facie Case

In order to establish a *prima facie* case for age discrimination, Miller must show that 1) he was in the

protected class, *i.e.*, over 40 years of age; 2) he was qualified for the position; 3) that he suffered an adverse employment action; and, 4) that his replacement was under forty years of age. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. at 142; *Holtzclaw v, DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001); *Evans v. City of Bishop*, 238 F.3d at 590. SWBT concedes that Miller was over the age of forty, that he was qualified for his position, and that he was fired, thereby, suffering an adverse employment action. *See* Defendant's Motion for Summary Judgment (Entry #24). SWBT maintains, however, that Miller is unable to establish that he was replaced by a younger individual. *Id.*

Miller admits that he does not actually know who replaced him. See *id.*, Miller deposition at p. 141, Exhibit B. SWBT contends that it replaced Miller with Jim Osteen. See *id.*, affidavit of Dugas at para. 11, Exhibit C. Miller does not dispute that he was replaced by Jim Osteen. *See* Miller deposition, *Id.* SWBT maintains that when Osteen replaced Miller, Osteen was fifty-six (56) years old and Miller does not refute this. See *id.*, Miller deposition at p. 141. Miller is, therefore, unable to establish that he was replaced by a younger individual and, accordingly, is unable to demonstrate a *prima facie* case of age discrimination. *Evans v. City of Bishop, id.*

(ii) Defendant's Legitimate, Non-Discriminatory Reason and Lack of Pretext

If Miller were able to establish a *prima facie* case of discriminatory conduct violative of the ADEA, his allegations would fail for the same reasons advanced in the discussion of SWBT's articulation of a legitimate and non-discriminatory

reason for its actions and Miller's failure to establish pretext as to his claims of disability discrimination. Miller's allegation of age discrimination is, therefore, as susceptible to summary judgment as is his ADA discrimination claim.

III. The Retaliation Claim

Title VII makes it unlawful for an employer to retaliate against an employee for opposing an unlawful employment practice. See *42 U.S.C. § 2000e-3(a);* see also *Mato v. Baldauf,* C.A. 00-50522, *slip op.* 91, 96 (5th Cir. October 9, 2001). In order for Miller to prevail on his retaliation claim, he must establish that he engaged in activity protected by Title VII, that SWBT took adverse employment against him, and that a causal connection exists between the protected activity and the adverse action, *Id.; Holtzclaw v. DSC Communications Corp.,* 255 F.3d at 259. Miller maintains that the protected activity he engaged in was seeking an accommodation from SWBT as to his claimed disability, and that SWBT fired him for seeking the accommodation. *See* para. 1.2 and 6.6, Plaintiff's First Amended Complaint (Entry #17); Plaintiff's Response to Motion for Summary Judgment (Entry #25). SWBT does not dispute that seeking an accommodation for disability is protected activity.[6] Further, SWBT's termination of Miller's employment is the adverse consequence contemplated by Title VII. See *Walker v. Thompson,* 214 F.3d 615,628-29 (5th Cir. 2000); *Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir. 1997).

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[6] SWBT also claims that Miller failed to exhaust his administrative remedies because he did not claim retaliation when filing his EEOC Charge. *See* Defendant's Reply to Plaintiff's Response to Motion for Summary Judgment (Entry #30).

Miller, however, has failed to establish a causal *nexus* between his seeking an accommodation for his physical condition and SWBT's termination of his employment. As has been discussed, SWBT has articulated a legitimate, non-discriminatory motive for dismissing Miller that would have successfully rebutted the presumption of a *prima facie* case of discrimination, had Miller established such a case. Further, each relevant decision maker has averred that Miller's dismissal was not the result of seeking an accommodation, but his employment was terminated due to misconduct. *See* affidavits of Dugas, Mehaffey and Milliken, Exhibits C, D and E, Defendant's Motion for Summary Judgment (Entry #24). Additionally, Miller testified that the only post-surgical accommodation Miller's physician sought was that Miller be given two consecutive days per work week off, and SWBT accommodated that request. *See* deposition of Miller at pp. 139-140, Exhibit B, Defendant's Motion for Summary Judgment (Entry #24). Miller, not his doctor, requested that one of his day's off not include a Sunday and, accordingly, being allowed to work on a Sunday was not an accommodation that would have assisted Miller, in light of his physical condition, to perform his job. As the probative evidence does not establish that Miller suffered an adverse employment action causally connected to a protected activity, Miller's claim of retaliation is unable to survive summary dismissal. See *McKenon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 359-60 (1995); *Chaney v. New Orleans Public Facility Management,* 179 F.3d 164, 168 (5th Cir. 1999).

IV. The Intentional Infliction of Emotional Distress Claim

Miller seeks damages for SWBT's alleged tortious intentional infliction of emotional distress. *See* First Amended Complaint at paras. 6.7-6.9 (Entry #17). In Texas, an employee must prove the following elements to establish intentional infliction of emotional distress, that 1) the employer acted intentionally or recklessly; 2) the conduct was extreme and outrageous; 3) the employer's actions caused the plaintiff emotional distress; and, 4) the emotional distress that the plaintiff suffered was severe. *Hughes Training Inc. v. Cook,* 254 F.3d 588, 594 (5th Cir. 2001); *Wornick Co. v. Casas,* 856 S.W.2d 732, 734 (Tex. 1993). In order for SWBT's conduct to be considered extreme and outrageous it must be behavior "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hughes Training Inc. v. Cook, id.* Generally, ordinary employment disputes will not support a claim for intentional infliction of emotional distress, *Id.* Miller's claim of intentional infliction of emotional distress in this "discrimination in employment context" is only viable if he is able to establish that SWBT knew that he was peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. *Id.* at 595.

Miller, himself, indicates that SWBT fully accommodated his post-surgical requests. *See* deposition of Miller at pp. 139-140, Exhibit B, Defendant's Motion for Summary Judgment (Entry #24). Miller does not allege that SWBT harassed him with respect to his request for post-surgical assistance, but appears to contend that his firing,

alone, constituted SWBT's intentional infliction of emotional distress. *See* Plaintiff's Response to Motion for Summary Judgment (Entry #25). Miller's termination or SWBT's investigation of the matters underlying the termination, without more, is not enough to constitute the intentional infliction of emotional distress. *Hughes Training Inc. v. Cook,* 254 F.3d at 594-95; see also *Shaboon v. Duncan,* 252 F.3d 722, 734 (5th Cir. 2001). Miller's failure to adduce evidence raising an inference that SWBT's conduct was extreme and outrageous or that he suffered extreme emotional distress will not defeat summary judgment as to his claim of intentional infliction of emotional distress.

CONCLUSION

Miller's failure to demonstrate *prima facie* cases of age or disability discrimination, retaliation or to adduce evidence of extreme and outrageous conduct constituting the intentional infliction of emotional distress or FLSA violations, does not raise a genuine issue as to material fact asserted by his lawsuit. Miller's claims of age and disability discrimination, retaliation, FLSA violations and the intentional infliction of emotional distress must, therefore, be sumarily dismissed. *See Haas v. Advo Systems, Inc.,* 169 F.3d 732, 733 (5th Cir. 1999); see also *Chaney v. New Orleans Public Facility Management,* 179 F.3d at 167. It is, therefore,

ORDERED that Southwestern Bell Telephone Company's Motion for Summary Judgment (Entry #24) is **GRANTED**. Further, it is

ORDERED that this matter is **DISMISSED with prejudice** from the dockets of this Court.

The Clerk of Court shall file this Memorandum and Order and provide the parties with a true copy.

SIGNED at Houston, Texas, on this the 22nd day of October, 2001.

/s/ _____
Calvin Botley
United States Magistrate Judge

(2)

Supreme Court, U.S.
FILED
FEB 4 2003
CLERK

No. 02-1026

In the

Supreme Court of the United States

MICHAEL L. MILLER,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether Petitioner failed to exhaust his administrative remedies on his claim of retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12102 *et seq.*, when he failed to check the "retaliation" box on the charge he filed with the Equal Employment Opportunity Commission and he otherwise failed to disclose his claim of retaliation to the EEOC even though the alleged retaliation occurred before he filed his charge?

(2) Whether Petitioner is substantially limited in the major life activity of working and considered disabled, as defined by the Americans with Disabilities Act, because his physician temporarily restricted him from working more than 10 hours overtime per week?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Southwestern Bell Telephone Company was formerly a Missouri corporation. On December 30, 2001, Southwestern Bell Telephone Company became Southwestern Bell Telephone, L.P., a Texas Limited Partnership. Southwestern Bell Telephone, L.P. is a wholly-owned subsidiary of SBC Communications Inc., a publicly traded Delaware corporation. SBC Communications Inc. has no parent company.

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JURISDICTION

The court of appeals entered its judgment on October 7, 2002. The petition for writ of certiorari was filed on January 6, 2003 and docketed on January 8, 2003. This Honorable Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner is a former employee of Respondent Southwestern Bell Telephone Company ("Company"). On September 21, 1998, Petitioner turned in a time report to his manager charging the Company for 2 ¼ overtime hours for a job that he did not work. After an investigation, management determined that another technician was actually dispatched to and completed the repairs the Petitioner reported having completed. Because Petitioner falsified his time report, he was terminated effective November 10, 1998 for falsifying his time report, a violation of the Company's Code of Business Conduct.

On or about October 21, 1999, Petitioner filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging disability and age discrimination. On or about April 11, 2000, Petitioner's charge was amended to cure a technical defect so as to specifically reference the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, in the text portion of the charge. Neither the original nor the amended charge filed with the EEOC alleged or in any way referenced a claim of retaliation. The EEOC issued a "right-to-sue" letter and Petitioner eventually brought this suit in federal district court on June 5, 2000.

B. Proceedings Below.

On October 22, 2001, the district court granted Respondent's motion for summary judgment on all of Petitioner's claims finding that Petitioner failed to establish a prima facie case of discrimination and/or retaliation under the ADA, that Respondent had a legitimate, non-discriminatory reason for dismissing Petitioner, and that Petitioner failed to offer evidence sufficient to find that Respondent's stated reasons were pretextual for discrimination or retaliation. The opinion of the district court was not published but has been attached to the Petition for Writ of Certiorari as Appendix "D". *See* Pet. App. 23a-44a.

On October 7, 2002, the Fifth Circuit issued its opinion affirming the district court's judgment granting Respondent's motion for summary judgment. The Fifth Circuit concluded that Petitioner was not disabled, as defined by the ADA, and that he had failed to exhaust his administrative remedies concerning his claim for retaliation under the ADA. The opinion of the court of appeals was not published but has been attached to the Petition for Writ of Certiorari as Appendix "A". *See id.* at 1a-18a.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that review on a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. Therefore, a petition for a writ of certiorari will be granted only for compelling reasons. *Id.* In the present case, there is absolutely no reason, let alone a compelling one, for this Honorable Court to grant the petition. The petition does not seek the resolution of a legal issue of national importance, and there is no conflict among the circuits warranting this Court's intervention.

As a basis for requesting review, Petitioner criticizes the Fifth Circuit's ruling that he failed to exhaust his administrative remedies when he failed to allege retaliation in his EEOC charge or otherwise notify the EEOC that he was complaining of unlawful retaliation. Petitioner claims that the Fifth Circuit ruled on such an important question of federal law that this Court is compelled to grant the petition. While this Court has not considered the very narrow question presented, this case presents no compelling or important issues of federal law requiring this Court's review.

To support his request for review, Petitioner claims that the Fifth Circuit misinterpreted and misapplied a decision of the Seventh Circuit. This assertion is not meritorious. The Fifth Circuit below properly concluded that Petitioner failed to exhaust his administrative remedies on his claim of retaliation because Petitioner failed to allege retaliation in his EEOC charge or otherwise notify the EEOC that he was complaining of unlawful retaliation even though the complained of retaliation occurred before Petitioner filed his EEOC charge. The other courts of appeals to have considered this issue have ruled uniformly with the Fifth Circuit. Consequently, there is no conflict in the circuits warranting this Court's intervention.

Moreover, the district court found that, regardless of whether Petitioner exhausted his administrative remedies, Respondent nevertheless was entitled to summary judgment on the merits of the retaliation claim. Consequently, even if the Fifth Circuit were in error, the error is harmless.

As an additional basis for requesting review, Petitioner challenges the Fifth Circuit's ruling that the Petitioner's temporary inability to work in excess of 10 hours of overtime per week was not a substantial limitation on his ability to work. Petitioner contends that this Court should grant the petition because this Court has not ruled on

the issue of whether an employee's inability to work 10 hours of weekly overtime constitutes a disability under the terms of the ADA. Again, this issue is so narrow and so fact-specific that it does not present a legal question of national importance warranting this Court's review. The Fifth Circuit properly concluded, again consistent with the rulings of several sister courts of appeals, that Petitioner's inability to work overtime was not a substantial limitation on his ability to work. In the present case, the Petitioner could and did work for the Respondent as a full-time employee, notwithstanding any overtime restrictions.

Furthermore, even if Petitioner was temporarily unable to work mandatory overtime in his specific job, pursuant to this Court's recent decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), Petitioner failed to establish a prima facie case (*i.e.* that he was disabled from working) because he did not plead or prove that he was incapable of performing a broad range of jobs. Consequently, even if the Fifth Circuit were in error on the issue of overtime restrictions, the error is harmless because Petitioner was not disabled from working.

Because the Fifth Circuit's ruling is proper in all respects and Petitioner has not presented any important issue of federal law that compels this Court's review, Respondent respectfully urges this Honorable Court to deny the petition.

ARGUMENT AND AUTHORITIES

A. There is no compelling reason for this Court to grant the petition because it is well settled that an employee seeking redress for a claim of unlawful retaliation must first exhaust his administrative remedies with the EEOC when the alleged retaliation occurs before the EEOC charge is filed.

In a veiled attempt to garner this Court's attention, Petitioner argues that this Court is compelled to rule on the narrow question presented since the Court has not yet addressed the specific issue. Petitioner further suggests that the Fifth Circuit's ruling is in conflict with the ruling of a sister circuit. There is no compelling reason to grant the petition because there is no conflict in the courts of appeals and the narrow question presented does not warrant this Court's review.

1. The narrow question presented does not warrant this Court's review and the courts of appeals have ruled uniformly.

In the present case, the Petitioner alleged claims of intentional disability discrimination and retaliation under the ADA. This Court has previously observed that there are certain jurisdictional prerequisites that an employee must satisfy before he is entitled to institute a discrimination lawsuit (*i.e.* timely filing a charge of employment discrimination with the EEOC). *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (involving Title VII of the Civil Rights Act of 1964); *see also* AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12117(a) (1994)(incorporating Title VII procedural requirements into ADA). The purpose of requiring an employee to exhaust his administrative remedies is to preserve judicial

economy by barring claims that have not been sufficiently investigated following an EEOC complaint. See *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992).

Following this authority, the Fifth Circuit has specifically held that an employee may not bring an ADA claim in a lawsuit when that claim was not included in the employee's EEOC charge. *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996). Consequently, to pursue a claim for "retaliation" under the ADA, an employee must first exhaust his administrative remedies by filing a charge with the EEOC alleging unlawful retaliation. *See Cable v. Ivy Tech State College*, 200 F.3d 467, 477-78 (7th Cir. 1999); *Morton v. GTE North, Inc.*, 922 F. Supp. 1169, 1177 (N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir.), *cert. denied*, 522 U.S. 880 (1997); *McCray v. DPC Industries, Inc.*, 942 F. Supp. 288, 295 (E.D. Tex. 1996).

In the present case, the Fifth Circuit properly concluded that Petitioner failed to exhaust his administrative remedies on his claim of retaliation when he failed to make any reference to a claim of retaliation in the charge that he filed with the EEOC. See Pet. App. at 18a. First, the court observed that in his EEOC charge, Petitioner neither marked the "retaliation" box nor indicated in the narrative of his charge that he was seeking redress from the EEOC for unlawful retaliation. *Id.* at 16a. The court further noted the absence of "other supplemental EEOC materials" evidencing that Petitioner complained about unlawful retaliation when he filed his charge with the EEOC. *Id.* At this point in its analysis, the court found significant the complete absence of any reference to a claim of retaliation during the administrative process before the EEOC. See *id.*

Next, the Fifth Circuit addressed the issue of whether an employee complaining of retaliation was

required to file a charge with the EEOC alleging retaliation. In its analysis, the court distinguished between circumstances in which the alleged retaliation occurs before the employee files a charge with the EEOC and those instances where the alleged retaliation occurs after the employee filed the EEOC charge. *See id.* at 17a. In *Gupta v. East Texas State University*, 654 F.2d 411, 414 (5th Cir. 1981), the Fifth Circuit ruled that when retaliation occurs *after* an EEOC charge is filed, an employee is not required to file a second charge alleging retaliation in order to exhaust his administrative remedies. However, when the alleged retaliation occurs *before* the initial EEOC charge is filed, an employee must exhaust his administrative remedies on that claim by filing an EEOC charge because to hold otherwise would effectively exempt all retaliation claims from the requirement that the employee first exhaust his administrative remedies through the EEOC. *See McCray*, 942 F. Supp. at 295 (summary judgment granted on employee's retaliation claim where alleged retaliation occurred before EEOC charge was filed and employee failed to check "retaliation" box on the charge); *Perez v. MCI World Com Communs.*, 154 F. Supp.2d 932 (N.D. Tex. 2001) (summary judgment granted on retaliation claim because employee did not check "retaliation" box or include any statements in EEOC charge regarding retaliation even though alleged retaliation had already occurred); *Price v. Harrah's Maryland Heights Operating Co.*, 117 F. Supp. 2d 919, 921-22 (E.D. Mo. 2000) (granting summary judgment for employer due to failure of employee to exhaust her administrative remedies by not checking "retaliation" box and by not specifically alleging retaliation in text of EEOC charge).

Like the Fifth Circuit below, several other courts of appeals to have considered this very issue have uniformly required that an employee exhaust his administrative

remedies by making allegations of retaliation to the EEOC when the alleged retaliation occurs *prior to* the date that the EEOC charge is filed. *See Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 688-89 (8th Cir. 1998)(affirming summary judgment for employer because employee did not allege retaliation in original charge filed with EEOC even though alleged retaliation occurred before charge was filed), *cert. denied*, 526 U.S. 1004 (1999); *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799-800 (10th Cir.) (affirming summary judgment for employer where employee failed to allege retaliation in EEOC charge even though alleged retaliatory act occurred before charge was filed), *cert. denied*, 522 U.S. 935 (1997); *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546-47 (6th Cir. 1991) (affirming summary judgment for employer where employee failed to mark the retaliation box on EEOC charge or otherwise refer to a claim of retaliation in statement to EEOC even though alleged retaliation occurred before employee filed the charge with EEOC); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544-45 (7th Cir. 1988) (affirming summary judgment for employer where employee failed to mark retaliation box on EEOC charge or otherwise refer to a claim of retaliation in statement to EEOC even though alleged retaliation occurred before employee filed the charge), *cert. denied*, 491 U.S. 907 (1989).

In the present case, the alleged "protected activity" occurred in September 1998 when Petitioner allegedly exercised his rights under the ADA and requested an accommodation to restrict his overtime hours. Significantly, Petitioner admitted in his deposition that Respondent fully accommodated Petitioner's request to limit his overtime hours. Moreover, Petitioner's original EEOC charge was not filed until October 21, 1999, more than one year after the alleged protected activity. Consequently, if Respondent retaliated against Petitioner

for exercising his rights under the ADA, the alleged retaliation occurred before he filed his EEOC charge. Petitioner failed to both check the retaliation box and to make any allegations concerning retaliation in his charge of discrimination filed with the EEOC. Because Petitioner failed to exhaust his administrative remedies on his claim of retaliation under the ADA, the Fifth Circuit properly concluded that Respondent was entitled to summary judgment as a matter of law.

2. The Fifth Circuit's decision does not conflict with the Seventh Circuit's decision in *Cable v. Ivy Tech State College.*

In its opinion, the Fifth Circuit cited to an decision by the Seventh Circuit, *Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999), for the proposition that an employee's failure to fill in the appropriate box in the EEOC charge alleging retaliation, coupled with the inability to describe the general nature of the disputed claim in the narrative section of the charge, forms a sufficient basis for summary judgment because of the employee's failure to exhaust his administrative remedies. See Pet. App. at 15a.

In *Cable*, the plaintiff, like Petitioner here, alleged disability discrimination and retaliation under the ADA. The Seventh Circuit found that the plaintiff failed to sufficiently describe the retaliation claim in the EEOC charge. *Cable*, 200 F.3d at 477. However, the court looked to the appellate record for additional charge information the employee provided to the EEOC to determine if the employee raised the issue of retaliation. See *id.* at 477-78. Ultimately, the court concluded that the additional affidavit and charge information that the employee provided to the EEOC was sufficient to find that the

employee exhausted her administrative remedies. *See id.* at 478.

Contrary to Petitioner's claim, there is absolutely no conflict between the Fifth Circuit's decision below and the Seventh Circuit's decision in *Cable*. Like the plaintiff in *Cable*, Petitioner failed to make any allegations of retaliation in the charge document filed with the EEOC. Unlike *Cable*, however, in the present case there is no evidence in the trial or appellate record of any additional affidavits or charge information that Petitioner filed with the EEOC that would have put the EEOC or Respondent on notice that, in addition to claiming disability discrimination, Petitioner was also asserting a claim of retaliation.[1]

In conclusion, the Fifth Circuit's ruling that the Petitioner failed to exhaust his administrative remedies on his claim of retaliation does not present such a compelling or important issue of federal law that this Court should grant the petition. Consequently, the Respondent urges the Court to deny the petition.

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[1] In his petition, Petitioner references a charge information form wherein he allegedly put the EEOC and Respondent on notice that he was complaining of retaliation for having requested an accommodation regarding overtime. Fundamentally, this charge information form is not a part of the appellate or trial record. Moreover, the form does not allege facts supporting a claim of retaliation.

B. There is no compelling reason for this Court to grant the petition to determine the narrow issue of whether the temporary limitation on Petitioner's ability to work in excess of 10 hours of overtime per week was a substantial limitation on his ability to work thus rendering him disabled under the ADA.

The second question presented by Petitioner is so narrow and fact-specific that there is no compelling reason for this Court to grant the petition. Petitioner has asked this Court to decide whether his doctor-imposed limit of a maximum of 10 hours of overtime per week constituted a substantial impairment of Petitioner's ability to work such that he was "disabled" under the ADA. In its decision below, the Fifth Circuit cited to a decision of the Sixth Circuit for the proposition that the inability to work overtime is not a substantial limitation on the ability to work under the ADA. *See* Pet. App. at 11a.

In *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593, 598-99 (6th Cir. 2002), the Sixth Circuit found that an employee's inability to work overtime does not constitute a substantial limitation on the employee's ability to work, as defined by the ADA. Like the Fifth and Sixth Circuits, other courts considering this very issue have uniformly concluded that an employee's inability to work overtime does not constitute a substantial limitation on the employee's ability to work. *See Kellogg v. Union Pac. R.R.*, 233 F.3d 1083, 1087 (8th Cir. 2000); *Tardie v. Rehabilitation Hospital of Rhode Island*, 168 F.3d 538, 542-43 (1st Cir. 1999); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999); *Doebele v. Sprint Corp.*, 157 F. Supp. 2d 1191, 1211 (D. Kan. 2001); *Muthler v. Ann Arbor Machine, Inc.*, 18 F. Supp. 2d 722, 728-29 (E.D. Mich. 1998); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 808 (N.D. Ind.

1996). Anyone who can work 50 hours per week is not suffering a substantial limitation on a major life activity, namely, the ability to work. *See Brennan v. National Telephone Directory Corp.*, 850 F. Supp. 331, 343 (E.D. Pa. 1994). Quite simply, the inability to work overtime hardly makes a person disabled. *See id.*; *see also Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 599 (6th Cir. 1999) (affirming summary judgment for employer because even though the employee was unable to work overtime, the employee was not disabled; whether an employee is disabled does not turn on workable hours).

Petitioner erroneously contends that because a service emergency had been declared and other employees were being required to work 44 hours of overtime per week during the service emergency, he was substantially limited in his ability to work because he was authorized by his physician to only work a maximum of 10 hours of overtime per week. Petitioner's argument is without merit. *See Tardie v. Rehabilitation Hospital of Rhode Island*, 6 F. Supp. 2d 125, 130 (D.R.I. 1998), *aff'd*, 168 F.3d 538 (1st Cir. 1999) (employee's inability to work more than 40 hours per week did not render her disabled even though her job *required* her to work in excess of 50 hours per week). In the present case, Petitioner could and did work as a full-time employee, notwithstanding his overtime restrictions. The service emergency was only temporary, as were Petitioner's overtime restrictions.

Moreover, even assuming that Petitioner was unable to work in excess of 10 hours of overtime per week, his inability to perform one aspect of his job (*i.e.* greater than 10 hours of overtime per week) while retaining the ability to perform the work in general does not amount to a substantial limitation on his ability to work. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726-27 (5th Cir. 1995).

In *Sutton v. United Air Lines*, this Court held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." 527 U.S. at 491. According to this Court, "[t]o be substantially limited in the major life activity of working, . . . one must be precluded from more than one type of job, a specialized job, or a particular choice of job." *Id.* at 492. Likewise, in *Toyota Motor Manufacturing v. Williams*, this Court emphasized that "the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with his specific job." 534 U.S. at 201. Although Petitioner may have been temporarily restricted from working in excess of 10 hours of overtime per week in his specific job, there was no evidence that he could not perform any other of a broad range of jobs because of this temporary overtime restriction.

In conclusion, the Fifth Circuit's ruling that Petitioner's inability to work more than 50 hours in a workweek did not make him disabled under the ADA is correct. Moreover, the Fifth Circuit's narrow and fact-specific ruling does not present such an important issue of federal law that this Court is compelled to grant discretionary review. Indeed, because the question presented can be answered by this Court's decisions in *Sutton* and *Toyota Motor Manufacturing* this Court should deny the petition.

C. The Court should not consider petitioner's claim of error on the merits of his disability or retaliation claims.

Petitioner devotes several pages of his petition to quarreling about the district court's rulings on the merits

of his claims for disability discrimination and retaliation. While it is tempting to engage in a debate of the merits of those claims, suffice it to say that the evidence in the record supports the lower courts' findings that Petitioner's claims for disability discrimination and retaliation fail as a matter of law. Consequently, even if this Court were to grant the petition on the narrow questions presented, the record supports Respondent's entitlement to summary judgment.

IV.
CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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